FOR ARGUMENT

IN THE SUPREME COURT
OF THE UNITED STATES

NO. 77-515

HOLT CIVIC CLUB, etc., et al.,

Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF FOR THE APPELLANTS

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I.

JURISDICTION

A. Appellants Have Standing to Challenge the Statutes Here Involved.

Appellees in their brief to this Court suggest for the first time that appellants totally lack standing in the sense of a lack of a live controversy

between the parties.[1] Appellants suggest, however, that a case or controversy is plainly reflected in this record.[2]

Appellees implicitly acknowledge that the complaint alleged proper standing at some point, appellants being subjected to various licenses and permits. Brief of Appellees, 11. But, for example, they

1. The only prior "standing" argument raised was a lack of jurisdiction by virtue of 28 U.S.C. §1341, and a claim in the court of appeals that certain regulatory actions had not been applied to named plaintiffs. Brief of Appellees, No. 75-3323, p. 8.

2. Although standing is relevant at any point during litigation, Steffel v. Thompson, 415 U.S. 452, 459 n. 10 (1974), appellants suggest that the failure to raise this issue previously in the five years this case has been pending reflects the issue's lack of merit. It is not based on any newly developed circumstances. As pointed out in appellants' brief, appellees conceded standing in the court of appeals. There was no apparent need to supplement the record on remand to further establish standing. If there is any question of standing factually, appellants would welcome an inquiry into standing on remand.

complain that "[t]here is no allegation that [plaintiff Clyde Jones] is presently engaged in business or that he is now, or will in the future be, required to take out or pay for a license."[1] Ibid. But beyond allegation, the record reflects the governmental activity of building permits, licenses, police patrolling, etc., for 1973-75. (A. 13-16, 33-35, 41) In view of the record and the fact that the district court found that plaintiffs had standing to represent the residents of the police jurisdiction (JSA 24a-25a), it borders on the frivolous to suggest that the appellants and the class they represent are not currently subjected to the acts complained of. See, Wooley v. Maynard, 430 U.S. 705 (1977); Ellis v. Dyson, 421 U.S. 426 (1975).

1. An exact time of these instances was not pleaded. While defendants have never been required to answer, four motions to dismiss were filed in the district court. Defendants never joined issue on whether the injuries were on-going. The record reflects that they clearly are, but beyond this, the attempt to so frame the issue at this stage is known in other contexts as "sandbagging." Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

There cannot be a serious question that appellants have alleged facts which establish that they have in fact been injured by the matter they seek to have reviewed. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38-39 (1976). The impact that the challenged statutes has on each resident of the police jurisdiction is direct, easily perceived and ascertainable, not in the least bit theoretical or speculative, and traceable directly to the defendants. Compare, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Ellis v. Dyson, 421 U.S. 426 (1975); United States v. SCRAP, 412 U.S. 669 (1973); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); and Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) with Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Kentucky Welfare Rights Organization, supra; Linda R.S. v. Richard D., 410 U.S. 614 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968).

B. This Court Has Jurisdiction to Hear This Appeal.

Appellees do not press their argument that a three-judge court was not required, save to recite the law that a three-judge court is necessary only when a statute of statewide application is involved.[1] This prerequisite exists here, Brief of Appellants, 18-19, and appellants will not argue this further.

Nor do appellees appear to press the argument that the Tax Injunction Act, 28 U.S.C. §1341, bars jurisdiction. They "insist" upon it with no discussion. Brief of Appellees, 13. But even if collection of taxes were the sole issue herein, appellees have not disputed appellants' contention that "a plain, speedy and efficient remedy" in the state courts does not exist. Compare, Tully v. Griffin, Inc., 429 U.S. 68 (1976). If appellants were seeking to challenge a state tax, or even if their constitutional claims were

1. They do mention that no notice of hearing five days in advance to the governor and attorney general was given as required by 28 U.S.C. §2284. Since there has never been a hearing in this case the relevance of this argument is not readily apparent.

perceived to be a sham in order to enjoin a state tax, then §1341 might be of some moment. But when the power to govern is the core issue, taxing authority being merely incidental thereto, the federal judicial forum cannot be closed to appellants for the reasons previously stated in Brief of Appellants, 12-13.[1]

II.

MERITS

Appellees have suggested only one possible substantial state interest for the governing (by some entity) of police jurisdictions--that of providing some

1. The purposes of Congress in enacting §1341, to prevent disruption of state revenue collections by suits brought by foreign corporations and to remove the advantage of out-of-state litigants with access to federal courts, S.Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937); H.R. Rep. No. 1503, 75th Cong. 1st Sess. 1-2 (1937), are not at all disserved by maintenance of this suit.

Appellants would also point out that the Anti-Injunction Act, 28 U.S.C. §2283, has no relevancy here for there are no state court proceedings. See, e.g., Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977).

government for the urban fringe.[1] The questions that follow are (a) whether the structure challenged infringes rights such that it must be justified as necessary to further this interest and (b) if so, whether it is so justified.

A. The Governing Without Franchise Must Be Justified as Necessary to Further the State's Interest.

Appellants raise a challenge where there has been an extension of general governmental powers. Appellees erroneously state the issue as being whether or not strict judicial scrutiny must be applied where "a state grants any vestige of extraterritorial jurisdiction to its municipalities." Brief of Appellees, 10 (emphasis added).

1. Appellees have not elaborated on their claim that the governing is both for the benefit of police jurisdiction residents and to protect city residents from undesirable conditions in the police jurisdiction. Motion to Affirm, 5. That some government is necessary does not at all mean that governance by the adjacent municipality is necessary. The argument that cities want to protect "the citizens within the municipality from unwholesome, unhealthy and unlawful activities. . .immediately adjacent," ibid., is a two-way street.

The appellees' argument that the strict scrutiny standard is not applicable to this case is based on Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973). The basis of the Court's holding in Salyer was that the one person - one vote requirements of Reynolds v. Sims, 377 U.S. 533 (1964), and its progeny did not apply "by reason of [the district's] special limited purpose and of the disproportionate effect of its activities on landowners as a group," 410 U.S. at 728. While the rational relationship standard applies upon a finding of a special, limited purpose, Salyer reaffirmed that strict judicial scrutiny applies to general governmental authority. Avery v. Midland County, Texas, 390 U.S. 474 (1968). Salyer, supra at 728.

Nearly all of the municipal services the Court noted to be lacking in Salyer are provided by the City of Tuscaloosa for the police jurisdiction: public transportation, fire department, and police. There has been no claim, much less a showing, that the City of Tuscaloosa (as it exists to provide services and governance to the police jurisdiction) is a special, limited purpose

government like the Tulare Lake Basin Water Storage District. It can hardly be gainsaid that appellants have "a distinct and direct interest" in the government imposed upon them. Kramer v. Union Free School District No. 15, 395 U.S. 621, 632 (1969); Salyer, supra at 726.

Appellees' argument that the Holt residents do not live in Tuscaloosa and therefore have no right to vote in Tuscaloosa elections simply begs the question. As appellants have already pointed out (Brief of Appellants, 21), the residents of Holt live inside the City of Tuscaloosa for purposes of the City's jurisdiction over them but live outside the City for purposes of their jurisdiction (i.e., the right to vote) over the City government.

In Dunn v. Blumstein, 405 U.S. 330 (1972), this Court invalidated a distinction between old and new residents. The result would have been no different if Tennessee had sought to define new residents as not being "residents" at all. Yet such a definition is at the core of this argument of appellees.

Even where a suspect classification or a fundamental right is not involved,

this Court has construed the Fourteenth Amendment to forbid arbitrary and discriminatory classifications by the State. Under this traditional rational relationship test:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Johnson v. Robison, 415 U.S. 361, 374-75 (1974), quoting from Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

Accord: Vlandis v. Kline, 412 U.S. 441 (1973)(irrebuttable presumption of non-residency invalid). The definition of police jurisdiction residency does not even meet this test.

In the effort to avoid the stricture of the equal protection clause, appellees argue that the State has simply transferred or assigned some of its police power over unincorporated areas to cities. This ignores the fact all police power belongs to the State and all power possessed by a city has been transferred from the State. The question is not the source of the power but whether the State may allow some

persons and not others subject to the jurisdiction of the State's delegate (the city) to vote in elections to choose those who wield the power. This Court has previously held that

> Inequitable apportionment of local governing bodies offends the Constitution even if adopted by a properly apportioned legislature representing the majority of the State's citizens. Avery v. Midland County, Texas, 390 U.S. 474, 481 n. 6 (1968).

If power is to be placed in the hands of a local government, that government must comply with the equal protection clause in its electoral structure. At bottom appellees claim that appellants had a voice in the selection of state level officials who fashioned the government. "Appellants herein vote for their state senators and state legislators who fashion the laws complained of in this suit." Brief of Appellees, 33. Not only was this expressly refuted in Avery, supra, but presumably that argument, if correct, would have ended the claim in Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), for the restricted franchise in school board elections held unconstitutional there was also encompassed in state statutes.

Appellants make one further argument to avoid the strict scrutiny test--that police jurisdictions are not really governed but merely regulated. They actually claim that residents of the police jurisdiction "are not governed by the adjacent municipal corporation in any sense of the word." Brief of Appellees, 31.

In order to show that the City of Tuscaloosa does not govern in the police jurisdiction, the appellees list the powers that the County of Tuscaloosa may lawfully exercise in the police jurisdiction, in the City of Tuscaloosa, in fact anywhere in the County. They list powers and responsibilities that the City of Tuscaloosa does not have in the police jurisdiction.[1] Brief of Appellees, 30-32). These two

1. Most of the powers listed as being absent in the police jurisdiction (Appellees' Brief at 31) are also absent within the City. As the appellees point out, there is a county recreation board, a county hospital, a county library, a county board of health, a county board of registrars. The presence or absence of these powers does not tell us anything about the difference in authority exercised by the City within the City proper and within the police jurisdiction.

Finally, the City claims it "does not have any control or jurisdiction of streets, roads or highways" in the police jurisdiction. Id. But it regulates the speed and movement of traffic over these roads, see Addendum A to Appellants' Brief, A-2.

lists neatly avoid a comparison of the City's powers in the City with its powers in the police jurisdiction.

Alabama law requires a city to enforce all of its "police and sanitary regulations" in the police jurisdiction, Ala.Code §11-40-10 (1975). The only type of "police power" that has been excluded from this broad definition is the power to zone for land uses. The city may collect a license fee or tax in the police jurisdiction of not more than one-half of the amount charged within the City limits, Ala.Code §11-51-91(1975). The differences between the powers in the City and in the police jurisdiction are not great at all. The appellees prefer to refer to these powers as "regulations" (Brief of Appellees, 36) and claim that the City does not govern the police jurisdiction. Whatever they are called, the fact remains that the people of Holt are governed in much the same way that Tuscaloosans are--but without the right to vote in city elections.

The appellants and those they represent are residents of an area under a general governmental authority, an authority

in which others may participate by the elective franchise, but from which franchise appellants are excluded. Consequently, the authority without representation must be shown to be necessary to further the state's interest. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

B. The State Has Not Advanced a Single Argument Seeking to Establish that the Governmental Structure at Issue is Necessary to Further Its Interest in Governing the Police Jurisdiction.

Appellees seem to believe that they have answered the constitutional question when they point out the need for regulation of the developing areas on the urban fringe outside the municipality, but they have failed to show any compelling reason why the method of government must be one which allows some persons, and not others, to vote. Their contention "that there may be as many proposals, as to the type and form [of government for the urban fringe], as there are teachers of political science" (Brief of Appellees, 30) apparently assumes that the issue in this case is

only an academic question of political science theory and not a constitutional one.

Appellees miss the point. If any method of government formation is less restrictive of appellants' rights, then the current structure "is not the least restrictive means necessary" to further the state's interest, Dunn v. Blumstein, 405 U.S. 330, 353 (1972).

Each of the alternatives appellants proposed in Brief of Appellants, 26, could be carried out in a manner consistent with the one person-one vote principle. The present system of extraterritorial powers, as exercised by Alabama cities, is not justified by necessity to meet a compelling need; rather there are less objectionable methods of exercising some governmental control over the urban fringe.

Appellants do not suggest these forms as options from which the Court should choose. They are suggested merely to establish first, that the present system is not the least restrictive means and second, that a decision that the current system is unconstitutional will not leave

the areas presently governed as police jurisdictions in a void. There is currently substantial governance available in Alabama by county and special purpose government.

This Court's recent decision in Foley v. Connelie, __U.S.__, 98 S.Ct. 1067 (1978), strongly supports appellants' contention that their general governance without electoral participation is unconstitutional. In Foley, the Court held that the police function is "one of the basic functions of government," "a most fundamental obligation of government to its constituency." 98 S.Ct. at 1071. The Court held that a state could restrict the position of police officer to citizens, those who could vote. Citizens can thereby participate in the making of policy and oversee its implementation. Such a restriction "represents the choice, and right, of the people to be governed by their citizen peers. . ." "The execution of the broad powers vested in [the police and other local officials] affects members of the public significantly and often in the most sensitive areas of daily life." 98 S.Ct. at 1071.

In contrast, appellants here are forbidden to choose the people by whom they are directly governed or to participate in formulation of the policies local officials will implement. They are thereby denied the basic right "to be governed by their citizen peers." Ibid.

CONCLUSION

This Court and the court below are properly vested with jurisdiction to decide this cause.

Appellants and those they represent are denied equal protection and due process of the laws because they are governed without the franchise, a franchise extended to others similarly situated. The State having advanced no justification for subjecting plaintiffs to its local governing structure without their electoral participation, the decision below must be reversed and remanded for consideration and issuance of appropriate relief.

Respectfully submitted,

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